## TABLE OF CONTENTS


| Section | | Page |
|---|---|---|
| Preliminary Statement | | 1 |
| Opinions Below | | 2 |
| Jurisdiction | | 2 |
| Questions Presented | | 2 |
| Statement | | 3 |
| 1. | *The History of the Litigation, August 12, 1960-June 15, 1964* | 3 |
| 2. | *Legislative Action Following Remand* | 4 |
| 3. | *The Decisions Below* | 6 |
| 4. | *Chapter 3* | 7 |
| Argument | | 8 |
| A. | *The Decision Below Was Correct* | 9 |
| B. | *A Custom of Local General Legislation Furnishes No Exemption From the Requirements of Equal Protection* | 15 |
| C. | *The Case Is Moot* | 16 |
| D. | *The Petitioners Lack Standing* | 20 |
| Conclusion | | 22 |
| Appendix 1 | | 23 |


### CITATIONS

*Cases:*


| | |
|---|---|
| *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-348 | 18 |
| *Boynton* v. *Hutchinson Gas Company*, 291 U.S. 656 | 21 |
| *Braxton Co. Court* v. *West Virginia*, 208 U.S. 192 | 21 |
| *Coleman v. Miller*, 307 U.S. 433, 466 | 20 |
| *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96 | 19, 20 |
| *Davis* v. *Mann*, 377 U.S. 678 | 11 |
| *Doremus* v. *Board of Education*, 342 U.S. 429, 433 | 9, 20 |
| *Gibson* v. *State*, 204 Md. 423, 104 A. 2d. 800, 805 | 16 |
| *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342 | 11 |
| *Harris* v. *Kansas*, 382 U.S. 894 | 15 |

*Cases* *Page*

*KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599, 600 ..... 17
*Lane* v. *Wilson*, 307 U.S. 268, 275 ..... 11
*Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 ..... 18
*Love* v. *Griffith*, 266 U.S. 32, 34 ..... 20
*Lucas* v. *Colorado General Assembly*, 377 U.S. 713 ..... 11
*Marshall* v. *Hare*, 277 F. Supp. 989 (E.D. Mich., 1964), reversed 378 U.S. 561 ..... 12
*Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 ..... 2, 4, 11
*McGowan* v. *Maryland*, 366 U.S. 421, 429 ..... 20
*Mills* v. *Green*, 159 U.S. 651, 653 ..... 17
*Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 373, n. 3 ..... 17
*Muskrat* v. *United States*, 219 U.S. 346, 354 ..... 9, 17
*Nickel* v. *Cole*, 256 U.S. 222, 225 ..... 18
*Rescue Army* v. *Municipal Court*, 331 U.S. 549 ..... 18
*Reynolds* v. *Sims*, 377 U.S. 553 ..... 9, 11, 12, 14
*Roman* v. *Sincock*, 377 U.S. 695, 710 ..... 14
*Silver* v. *Jordan*, 381 U.S. 415 ..... 15
*Smith* v. *Indiana*, 191 U.S. 138, 149 ..... 20, 22
*Stewart* v. *Kansas City*, 239 U.S. 14, 16 ..... 19
*Swann* v. *Adams*, 383 U.S. 210, 86 S. Ct. 767 ..... 9, 15, 16
*Travia* v. *Lomenzo*, 381 U.S. 431 ..... 18
*United States* v. *Alaska S.S. Co.*, 253 U.S. 133, 116 ..... 17
*United States* v. *Raines*, 362 U.S. 17, 22 ..... 20
*WMCA* v. *Lomenzo*, 377 U.S. 633 ..... 11, 18
*WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916, 920 (S.D. N.Y., 1965) ..... 18

*Constitutional Provision and Statutes:*

Fourteenth Amendment to the United States Constitution ..... *passim*
Ch. 2, Laws of Md., 1965 Spec. Sess. ..... *passim*
Ch. 3, Laws of Md., 1965 Spec. Sess. ..... *passim*
28 U.S.C. 1257(3) ..... 2

*Miscellaneous:*


| | Page |
|---|---|
| 82 C.J.S. 978 | 16 |
| Dixon, *Apportionment Standards and Judicial Power,* 38 Notre Dame Lawyer, 367, 391 (1963) | 15 |
| Hart & Wechsler, The Federal Courts and the Federal System (1953), p. 162 | 20, 21 |
| Maryland State Board of Health, Statistics | 23 |
| McKay, Reapportionment (1965), p. 387 | 18 |
| 6 Moore's Federal Practice 3074 | 17 |
| Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, (1951), p. 495, 469, 189 | 17, 18, 20 |
| Spencer, Contemporary Local Government in Maryland (Univ. of Md., 1965) pp. 15-17 | 15 |
| Stern & Gressman, Supreme Court Practice (1962), p. 434 | 17 |


*Newspaper References:*


| | |
|---|---|
| *Baltimore Evening Sun,* October 18, 1965, p. B24 | 5 |
| *Baltimore Morning Sun,* February 13, 1965, p. C7 | 15 |
| *Baltimore Morning Sun,* September 11, 1965, p. A10 | 8 |
| *Baltimore Morning Sun,* October 13, 1965, p. C26 | 5 |
| *Baltimore Morning Sun,* October 14, 1965, p. A21 | 5 |
| *Baltimore Morning Sun,* October 19, 1965, p. C22 | 5 |
| *Baltimore Morning Sun,* October 20, 1965, p. C28 | 5 |
| *Baltimore Morning Sun,* October 21, 1965, p. C20 | 5 |
| *Baltimore Morning Sun,* October 22, 1965, p. C24 | 5 |
| *Baltimore Morning Sun,* October 27, 1965, p. C6 | 5 |
| *Baltimore Morning Sun,* October 28, 1965, p. C20 | 5, 6 |
| *Bethesda-Chevy Chase Tribune,* December 31, 1965, p. 1 | 8 |
| *Washington Evening Star,* October 16, 1965, p. A1 | 5 |
| *Washington Evening Star,* October 28, 1965, p. C1 | 5 |
| *Washington Post,* October 22, 1965, p. B1 | 5 |

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1965**

---

**No. 1173**

---

HARRY R. HUGHES, ET AL., *Petitioners,*

*v.*

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Respondents.*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

### Preliminary Statement

This brief in opposition to the petition for writ of *certiorari* is submitted in behalf of all the respondents, with the exception of Governor Tawes and the other Maryland election officials who were the original defendants in this extended litigation, now approaching the end of its sixth year in the courts.[1] They are the Maryland Committee for Fair Representation, an unincorporated association, and six individual citizens and eligible voters of Maryland, the plaintiffs who instituted the litigation on August 12, 1960. All are identified on the first page of the petition for *certiorari*. In the courts below the case was captioned "*Harry R. Hughes, et al.*, v. *Maryland Committee for Fair Repre-*

[1] The respondents for whom this brief speaks are usually referred to in it as "these respondents".

*sentation, et al.,*" (P.A. 38).[2] For reasons which they fail to state, petitioners changed the caption on the petition filed in this Court. Respondents have observed the caption by which the case was identified in the proceedings below and under which, according to advice received from the Office of the Clerk, it has been docketed here.

## Opinions Below

The majority and dissenting opinions of the Court of Appeals of Maryland are reported in 241 Md. 471, 217 A. 2d 273. Two prior opinions of that Court, rendered at earlier stages of this litigation, are reported in 228 Md. 412, 180 A. 2d 656, and 229 Md. 406, 184 A. 2d 715. The previous opinion of this Court in the case, issued on June 15, 1964, is reported in 377 U.S. 656.

## Jurisdiction

Petitioners allege that this Court has jurisdiction by virtue of 28 U.S.C. 1257(3). These respondents, for reasons stated below, dispute that jurisdiction exists.

## Questions Presented

Three questions are presented, one substantive, the others jurisdictional or procedural, in nature. They are:

1. Whether the requirements of the Equal Protection Clause of the Fourteenth Amendment of the Constitution are met by a state statute, which (a) apportions representation in the lower house of a bicameral legislature on a substantially equal population basis while guaranteeing each political subdivision of the state a minimum of one delegate therein, and, (b) apportions representation in the

---

[2] References to the printed appendix filed with the petition for writ of *certiorari* are designated herein as "(P.A. )".

state senate on a basis which, while also guaranteeing each political subdivision a minimum of one senator, allows 37% of the state's population to elect a majority of the upper house, permits variances in the representation permitted as among the several political subdivisions which reach up to 6 to 1, with 25 out of a total of 29 political subdivisions assigned senatorial representation that varies more than 15% from an average senatorial district?

2. Whether this Court, upon a petition by persons who do not allege that any constitutional or federal rights are impaired by an existing and valid apportionment statute, should refuse to review as moot a decision of the highest court of a state holding a second apportionment statute to be unconstitutional under the Fourteenth Amendment, where the legislature provided that the second statute was to become effective and displace the first only if the highest court of the state had declared it to be valid, a contingency that did not occur?

3. Whether petitioners, who claim no private damage, allege no violations of federal constitutional rights, and have no responsibilities as state enforcement officials in vindicating the validity of a state apportionment statute, have standing in this Court to seek reversal of a state court's determination that the particular statute violated the federal constitution?

## Statement

Petitioners' statement of the case, while accurate, is significantly incomplete. These respondents, therefore, state below additional pertinent facts which, for the most part, are not referred to in petitioners' statement.

1. *The History of the Litigation, August 12, 1960—June 15, 1964.* The opinions of both the trial court (P.A. 23-26) and of the Maryland Court of Appeals (P.A. 39-40) sum-

marize the history of the litigation prior to the decision of this Court rendered on June 15, 1964, in *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656. A more detailed statement of that same history is set out in the majority opinion of this Court, 377 U.S., at 658-664.

2. *Legislative Action Following Remand.* After this Court's decision of June 15, 1964, the case was returned to the Court of Appeals of Maryland, which, on September 23, 1964, remanded it to the Circuit Court for Anne Arundel County, where the action originally began. The Court of Appeals directed the trial court to retain jurisdiction and to take affirmative action on the application of any of the parties in the event the Maryland legislature failed to enact a constitutionally valid state legislative apportionment act prior to the 1966 primary elections (P.A. 26).

The Maryland General Assembly did not pass any reapportionment legislation at its regular 1965 session. In the fall of 1965, respondent Governor Tawes convened a special session of the legislature for the purpose of enacting apportionment legislation which complied with the Fourteenth Amendment and satisfied the controlling mandate of this Court. The legislature passed two bills at the special session. The first, Ch. 2, Md. Laws, 1965 Spec. Sess., established a House of Delegates of 142 members, with each county and the six legislative districts of Baltimore City guaranteed one delegate each as a minimum. The remaining 113 delegates are apportioned among the political subdivisions on the mathematical formula of equal proportions (P.A. 13). Ch. 2 created a 43-member Senate to be elected on a population basis from 16 senatorial districts. Under this bill, 47.8% of the State's population would be required to elect a majority of 22 senators. In four instances, out of 29 districts, there are variances from the average population norm per district of slightly more than 15% (P.A. 32).

The 1965 Special Session of the General Assembly also passed a second reapportionment bill, Ch. 3, Md. Laws 1965, Spec. Sess. Ch. 3 reapportioned the House of Delegates on the same basis as permitted under Ch. 2. The second statute would create a State Senate of 53 members, with every county given one senator, with the exception of Anne Arundel, Baltimore, Montgomery, and Prince Georges counties, which are given, respectively, 3, 7, 6, and 6 senators each. The six legislative districts of Baltimore City are assigned two senators each by Ch. 3 (P.A. 6-9).

The legislative history of the two reapportionment acts passed at the 1965 special session of the Maryland General Assembly was marked by extended, and at times, extremely bitter debate.[3] Chapter 2 was enacted on October 22, 1965, the last day of the special session, just before Ch. 3 also was passed. Both bills passed the Senate by comfortable margins. Ch. 3, however, received only 77 votes in the House of Delegates, only 5 more than the required constitutional majority of the membership of 142. *Baltimore Morning Sun,* October 22, 1965, p. C24. Many legislators who voted for Ch. 3 stated their grave doubts concerning its constitutionality. *Washington Post,* October 22, 1965, p. B1. The bill was enacted in the face of the Attorney General's advice to the legislature that the bill was unconstitutional. *Baltimore Morning Sun,* October 20, 1965, p. C28.

The Governor signed both bills in order to avoid the acrimonious and extended floor fight which might have arisen at the outset of the regular 1966 session of the General Assembly if he had vetoed Ch. 3. *Baltimore Morning Sun,* October 27, 1965, p. C6; *Washington Evening Star,* October 28, 1965, p. C1. When signing the two bills in-

---

[3] See, e.g., *Baltimore Morning Sun,* October 13, 1965, p. C26; *ibid,* October 14, 1965, p. A21; *Washington Evening Star,* October 16, 1965, p. A1; *Baltimore Evening Sun,* October 18, 1965, p. B24; *Baltimore Morning Sun,* October 19, 1965, p. C22; *ibid,* October 21, 1965, p. C20; *ibid,* October 22, 1965, p. 24; *Washington Post,* October 22, 1965, p. B1.

volved in this case, the Governor expressed his hope that there would be a prompt court decision on the constitutionality of Ch. 3. *Baltimore Morning Sun,* October 28, 1965, p. C20. Section 4 of Ch. 3 also expressed the legislative intention that the bill be submitted for a prompt "judicial determination" of its validity "by the Court of Appeals of Maryland" (P.A. 12).

3. *The Decisions Below.* In the trial court, these respondents, the original plaintiffs, admitted the constitutionality of Ch. 2, but challenged the constitutionality of Ch. 3 under the Fourteenth Amendment. The original defendants, through the Attorney General of Maryland, conceded the unconstitutionality of Ch. 3, but supported the constitutionality of Ch. 2. The petitioners in this Court, both members of the Maryland State Senate, were permitted to intervene for the purposes of arguing the constitutionality of Ch. 3 (P.A. 26). They did not challenge Ch. 2. The Chancellor found that Ch. 2 was constitutional, but that Ch. 3 violated the Equal Protection Clause and was not "constitutionally sustainable, as either an interim or permanent apportionment plan". (P.A. 32) While none of the parties before him had attacked the constitutionality of Ch. 2, the Chancellor went on to consider this issue and found that bill to be constitutional. (P.A. 33)

The intervenors appealed to the Maryland Court of Appeals. On January 11, 1966, the Court of Appeals issued a *per curiam* order (two judges dissenting) upholding the decision of the trial court. Formal majority and dissenting opinions were filed on March 2, 1966 (P.A. 38). Five of the seven judges of the Court of Appeals found that the numerous and substantial variations in representation which Ch. 3 would permit in the Maryland State Senate rendered it "constitutionally impermissible" (P.A. 47).

Like the Chancellor, the Court of Appeals then went on to pass upon and uphold the constitutionality of Ch. 2 (P.A. 51)

4. *Chapter 3.* This act, which was to have become effective on June 1, 1966, provided that by that time it shall have been "declared valid by the Court of Appeals of Maryland" (P.A. 12), when applied to the 1960 official census population figures for Maryland and the political subdivisions thereof shows the following: Of the 29 political subdivisions of Maryland, including the six legislative districts of Baltimore City, 20 would have variances of more than 30% from an average district in the new Senate created by Ch. 3. Senatorial districts created by the bill which fall within 15 percent of an ideal senate district based on population number 4. The discrepancies in the respective weight accorded the vote of citizens in the various political subdivisions reach ratios of exceeding 5 to 1 in a number of instances, more than 4½ to 1 in several others, 4 to 1 in others, and 3½ to 1 in others. Political subdivisions of the State containing 75 percent of the 1960 population are given only 64 percent of the representation to be provided in the new Senate. (P.A. 52). A majority of the State Senate could be elected by 37% of the State's population (P.A. 44). The substantial discrepancies which are permitted by Ch. 3 exist not only between the less populous as opposed to the populous counties, but are found also among the less populous counties themselves, reaching, for example, 3 to 1 in the case of Kent and Calvert County in relation to Wicomico County's senate representation (P.A. 29).

Current population estimates and projections, as compiled by the Maryland State Board of Health,[4] show that

[4] These statistics are found in Appendix 1 submitted to the trial court and printed with this brief.

most of the discrepancies which Ch. 3 would permit are even greater at the present time than those which result if the 1960 census statutes are used. For example, the population of Montgomery County each year increases by over 30,000, an amount greater than the 1960 populations of Calvert, Caroline, Dorchester, Kent, Queen Anne's and Somerset Counties. *Bethesda-Chevy Chase Tribune*, December 31, 1965, p. 1. By July 1, 1966, one month after Ch. 3 would have taken effect, four suburban counties and the City of Baltimore would contain approximately 80 percent of the population of Maryland, but would be entitled to only 64 percent of the Senate representation. By 1969, Montgomery County and Prince Georges County are expected to have a combined population of more than 1,136,000, or about 30 percent of the State's total. *Baltimore Morning Sun*, September 11, 1965, p. A10. Under Ch. 3, these two counties would receive only 23 percent of the Senate seats provided for therein.

If permitted to become effective, Ch. 3 would govern elections of the Maryland General Assembly to be conducted in 1966 and 1970 (P.A. 9). And until such time "as it is superseded by an amendment for that purpose to the Constitution of Maryland", Ch. 3 would establish the "membership of the Senate of Maryland . . .". (P.A. 10). If Ch. 3 does not become effective, Ch. 2 does, in such case becoming law on June 1, 1966. Ch. 2 has not been challenged in this litigation by any party hereto. Nor have any other proceedings been instituted to challenge its constitutionality.

## Argument

Several compelling reasons argue against issuance of the writ. These are: (1) that the case was correctly decided in accord with this Court's rulings in *Reynolds* v. *Sims*, 377 U.S. 553, and related reapportionment decisions; (2)

that Maryland's custom of handling local governmental matters by public local legislation cannot serve as an excuse for dispensing with the requirements of Equal Protection, *Swann* v. *Adams*, 383 U.S. 210; (3) that the case is moot, *Muskrat* v. *United States*, 219 U.S. 346, 354; and (4) that petitioners lack standing in this Court to seek reversal of the decision below, *Doremus* v. *Board of Education*, 342 U.S. 429. Respondents state these reasons in more detail in the remaining sections of this brief.

A. *The Decision Below Was Correct.* In affirming the trial court, the Maryland Court of Appeals invoked and correctly applied this Court's landmark holding in the Alabama reapportionment case, *Reynolds* v. *Sims*, 377 U.S. 553. Its ruling was unequivocal:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, *an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.*" [5] (Italics supplied throughout.)

The substantial disparities in Senate representation with which Ch. 3 abounds mock that holding. If there were questions of what is meant by a "substantial" dilution of a citizen's vote, the Court provided significant clues. First, in *Reynolds* v. *Sims, supra* when it said:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representa-

[5] 377 U.S., at 568.

tive form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. *And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.* Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is not easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

> One must be ever aware that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342."[6]

Secondly, three cases decided by this Court on the same day as it ruled in *Reynolds* v. *Sims* and *Maryland Committee for Fair Representation* v. *Tawes, supra,* furnish further evidence of what the Court had in mind when it applied the Equal Protection Clause to "substantial" dilutions of the voting franchise. We refer to: the New York case, *WMCA* v. *Lomenzo,* 377 U.S. 633; the Virginia case, *Davis* v. *Mann,* 377 U.S. 678; and the Colorado case, *Lucas* v. *Colorado General Assembly,* 377 U.S. 713. In each of these three decisions, the Court struck down as unconstitutional schemes of representation in state legislatures where the ratios between the most over-represented and the most under-represented areas did not exceed 3½ to 1, somewhat less than those allowed under Ch. 3. For example, in the Virginia case, the Supreme Court affirmed the trial court's voiding of an apportionment statute under which the ratio between the most populous and least populous senatorial districts was 2.65 to 1, while the maximum discrepancy in house representation was 4.36 to 1. In the Colorado case, the most compelling of all because there, at least, the people of Colorado had approved the reapportionment plan in a state-wide referendum, the Court held invalid ratios of 3.6 to 1 in the senate and 1.7 to 1 in lower house representation. Moreover, it reached this result in the face of a holding by the trial court that the Colorado lower house was "apportioned as nearly on a population basis as was practicable. . . ." 377 U.S. 713, 727.

Finally, if any lingering skepticism persisted that population variations of 2 to 1 or more might somehow be per-

[6] 377 U.S., at 562-563.

missible, at least where one house of a state legislature was based on population, this Court's reversal of a lower court in the Michigan reapportionment case should have thoroughly exploded it. There, a three judge court had upheld provisions of the very new Michigan State Constitution, under which representation in the lower house was based on population, where 60% of the population could elect a majority of the Senate, and where the representation afforded in that chamber allowed disparities slightly in excess of 4 to 1. *Marshall* v. *Hare*, 277 F. Supp. 989 (E.D. Mich., 1964). The Court reversed, 378 U.S. 561, on the authority of *Reynolds* v. *Sims, supra,* and the other reapportionment decisions handed down on June 15, 1964.

Petitioners, however, attempt to avoid the controlling impact of the decisions discussed above by seizing upon and textually isolating dicta in *Reynolds* v. *Sims,* and then attempting to apply it so as to impair or circumscribe the basic holding of *Reynolds* and the related reapportionment decisions. It is true, as they argue, that in *Reynolds* this Court did say:

> "A consideration that appears to be of more substance in justifying *some* deviations from population-based representation in state legislatures is that of insuring *some* voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions *some* independent representation in at least one body of the state legislature, *as long as the basic standard of equality of population among districts is maintained.* Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct dis-

tricts along political subdivision lines to deter the possibilities of gerrymandering. *However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population.* Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. *And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis.* But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."[7]

The petition labors in an effort to show that Ch. 3 complies with the several requirements and restrictions referred to in the language quoted above, all of which must be present if *some* deviations in population-based representation are to be permitted in order to insure "*some* voice to political subdivisions. . . ." However, and perhaps understandably, petitioners omit entirely mention of the controlling standard which applies in all cases, i.e., that the "basic standard of equality among districts . . . [be main-

[7] 377 U.S., at 580-581.

tained]". 377 U.S., at 580. This Court, we believe, has made it very clear that no substantial departures from population-based representation in either house of a state legislature are permitted under the Equal Protection Clause of the Fourteenth Amendment. The standard is applicable even in those cases where other non-discriminatory factors, such as existence as a political subdivision, may be taken into *some* account. That is the way the trial court and Court of Appeals approached the question of the constitutionality of Ch. 3. In doing so, they adhered closely to the decision of this Court in *Reynolds* v. *Sims, supra,* and followed precisely the instructions it gave in *Roman* v. *Sincock,* 377 U.S. 695, 710, where it said:

> "Rather, the proper judicial approach is to ascertain *whether,* under the particular circumstances existing in the individual State whose legislative apportionment is at issue, *there has been a faithful adherence to a plan of population-based representation, with such minor deviations only* as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."[8]

If the discrepancies which would be tolerated under Ch. 3 are only "minor deviations" from population-based representation, then black means white and *Reynolds* v. *Sims* and the several subsequent reapportionment cases decided in consistent fashion by this Court signify nothing. The Fourteenth Amendment cannot require one thing of Alabama, Virginia, New York, Colorado, and Michigan and yet not demand the same of Maryland and other states. The trial court and the Court of Appeals recognized that. Consequently, they decided the case correctly and in accord with the controlling precedents of this Court.

---

[8] 377 U. S. 695, 710.

B. *A Custom of Local General Legislation Furnishes No Exemption From Its Requirement of Equal Protection.* The courts below rightly concluded that this Court will insist on observance of the basic and controlling standard of substantially equal population-based representation in *all* cases, even when permitting *some minor* deviations in order to assure *some* representation for political subdivisions. The controlling requirement cannot be waived or diluted on the ground, advanced by the petitioners, that in Maryland "counties are of great and perhaps unexcelled importance as administrative units", although not so great, apparently, as to relieve the Maryland General Assembly from the torrent of local legislation with which it is biennially confronted. Spencer, Contemporary Local Government in Maryland, (Univ. of Md., 1965), pp. 15-17. These respondents, among others, are hopeful that the reapportionment of the Maryland legislature on a representative basis will further spur the already discernible movement toward the extension of home rule for the various counties of the State. *Baltimore Morning Sun,* February 13, 1965, p. C7. Whether or not that hope is realized, however, is irrelevant to the issues in this case. Other states where counties have been traditionally recognized as important units of local government have been required to adjust to the overriding prerequisites of the Equal Protection Clause, so far as representation in their legislatures is concerned. Among them are: Kansas, *Harris* v. *Kansas,* 382 U.S. 894; California, *Silver* v. *Jordan,* 381 U.S. 415; and, most recently, Florida, *Swann* v. *Adams,* 383 U.S. 210, 86 S. Ct. 767. The State of Florida, like Maryland, follows "a custom of handling local governmental matters by . . . public-local legislation . . . rather than by public-general legislation or county home rule." Dixon, *Apportionment Standards and Judicial Power,* 38 Notre Dame Lawyer,

367, 391 (1963). Both States can continue to observe the custom; but its existence cannot serve as an excuse for excepting Maryland, any more than Florida, from the requirements of the Fourteenth Amendment. Indeed, an *a fortiori* case is presented by the case at bar. Unlike Florida's situation, considered by the Court in *Swann* v. *Adams, supra,* Maryland has enacted a constitutional reapportionment statute, i.e., Ch. 2, Md. Laws, Spec. Sess. (1965). Therefore, the Court is not presented with the Hobson's choice of either permitting elections for a state legislature to proceed under an unconstitutional statute or invalidating the statute with the attendant risk of chaotic, state-wide, at-large elections.

C. *The Case Is Moot.* Petitioners ask the Court to render an advisory opinion, in a moot case, on a federal constitutional issue which is not necessary for it to decide, and where this Court's decision in favor of constitutionality could, pursuant to a permitted construction of purely state law, be legitimately avoided upon remand by both the Maryland Court of Appeals and the General Assembly. These jurisdictional infirmities, as discussed below, strongly argue that grant of the writ of *certiorari* in this case would be improvident.

In enacting Ch. 3 the Maryland General Assembly provided that it was to become effective upon the condition that it "shall be declared valid by the Court of Appeals of Maryland, . . ." (P.A. 12). The condition precedent which the legislature prescribed was one reflecting its concern that the reapportionment picture be promptly clarified; it was a reasonable legislative condition and within its power to make. No question concerning it was or could have been successfully raised below. 82 C.J.S. 978. The statutory contingency, however, did not occur. *Gibson* v. *State,* 204 Md. 423, 104 A. 2d. 800, 805. As a consequence, a prior, and

constitutional, statute, Ch. 2, becomes the law of Maryland on June 1, 1966. Accordingly, the federal constitutional issue arising in this litigation is foreclosed from further consideration. When the Court of Appeals of Maryland held Ch. 3 to be invalid, the statutory condition was not met, and the case became moot. *KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599, 600; *Mills* v. *Green*, 159 U.S. 651, 653; 6 Moore's Federal Practice 3074. Any controversy which existed between these respondents and the State of Maryland, either acting through its election officials or through volunteer intervenors, was extinguished by that decision. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 373, n. 3; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, (1951), p. 495. It cannot be revived and pursued in this Court, especially by the petitioners, who are not state officials entrusted with a duty to enforce the statute, and who can allege no private damage or violation of their own federal constitutional rights as a basis on which to invoke the Court's jurisdiction.

Respondents' contention that the case is now moot may, perhaps, arise upon an unusual set of facts. Still, the argument does not lack supporting analogies among the precedents of this Court. For instance, it has been held that a controversy usually ends if a statute which is the basis for an action is repealed. *United States* v. *Alaska S.S. Co.*, 253 U.S. 133, 116; Stern & Gressman, Supreme Court Practice (1962), p. 434, and cases cited. The case at bar presents a slightly different fact situation, but, we believe, calls for the same result. Here, the statute which is the basis for the action brought never became effective, since an express statutory condition precedent to its becoming law was not satisfied.

It is indisputable, of course, that this Court does not render advisory opinions. *Muskrat* v. *United States*, 219

U.S. 346, 354. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306. A judgment of this Court "must be the final and conclusive determination of the rights of the parties, subject to no revision by other departments of government". *Robertson & Kirkham, supra,* at 469. These restrictions on the appellate jurisdiction of the Court are further buttressed by its own self-imposed limitation when constitutional issues are pressed upon it for decision. These the Court will not pass upon "unless absolutely necessary to a decision of the case . . .". *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-348; *Rescue Army* v. *Municipal Court,* 331 U.S. 549.

The petition cannot survive application of the rules which protect against improvident or unfruitful exercise of the Court's appellate jurisdiction. The Maryland legislature elected to constitute the Court of Appeals of Maryland as the tribunal upon whose declaration of validity Ch. 3 would become effective. The General Assembly could have been less restrictive in the statutory condition which it established. It might have made the statutory contingency dependent, for example, upon a final declaration of validity by this Court, or as the New York legislature provided, upon a declaration by "a court of competent jurisdiction". *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, 920 (S.D. N.Y., 1965), affirmed *Travia* v. *Lomenzo,* 381 U.S. 431; and see the discussion in McKay, Reapportionment (1965), p. 387. The Maryland legislature chose to designate the Court of Appeals as the court whose decision *in favor* of the validity of Ch. 3 would trigger its effectiveness. It is true that the statutory condition imposed by the General Assembly would not have operated to bar review in this Court had the Court of Appeals upheld the constitutionality of Ch. 3 against the timely contentions of persons possessing them that the statute violated rights guaranteed by the federal constitution. *Nickel* v. *Cole,* 256 U.S. 222, 225. In such case,

there would be present the required adverse impact on federal constitutional rights. That indispensable element does not exist in the case which the petitioners seek to bring here. In effect, petitioners ask the Court to render an advisory opinion, telling the Court of Appeals of Maryland that it should have declared Ch. 3 valid and thus have permitted that statute to become effective, even though the Maryland General Assembly, in the lawful exercise of its legislative powers, did not elect to have the effectiveness thereof depend upon this Court's declaration of the statute's validity.

Further, even assuming *arguendo,* that the petitioners were right and that the Court of Appeals misapplied the Fourteenth Amendment, what consequences might ensue should this Court reverse? Too plainly for argument, on remand of the case to the Court of Appeals, the latter, purely as a matter of Maryland law, still could construe § 4 of Ch. 3 to require the conclusion that the statute had not become effective, thus precluding further defense of its constitutionality by State officials, because an indispensable condition precedent thereto had not been satisfied, i.e., that Ch. 3 had not been declared valid by the court to which the legislature had delegated the authority to make such an affirmative determination. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U.S. 96, 99; *Stewart* v. *Kansas City,* 239 U.S. 14, 16. If that is true, then it follows that the Court of Appeals could legitimately avoid the mandate of this Court by attributing to Ch. 3 under purely state law, an interpretation permitted, if not expressly called for, by the words of the statute itself, and not impaired by a ruling of this Court, even one which reversed the Court of Appeals on the federal constitutional question. The judgment of the highest court of a state that a case has become moot will be respected by this Court as one resting on an ade-

quate non-federal ground, unless that judgment represents an untenable attempt to evade decisions on federal questions. *Love* v. *Griffith*, 266 U.S. 32, 34; *Robertson & Kirkham, supra*, at 189. Moreover, the General Assembly of Maryland also is, and would remain, free, even in the event of a subsequent reversal by this Court to proceed on the assumption, again purely as a matter of state law, that Ch. 3 failed to satisfy the statutory contingency which it had expressly provided for in the act, and to recognize Ch. 2 as the only valid reapportionment statute in effect in Maryland as of June 1, 1966.

D. *Petitioners Lack Standing.* Even if the federal issue had not been mooted, as argued above, it is not one which the petitioners have standing to pursue in this Court. Whatever standing they may have been accorded under Maryland law as intervenors in the State court proceedings to defend the constitutionality of Ch. 3, such status does not automatically carry over to sustain their right to invoke the jurisdiction of this Court. In the federal sphere "a litigant may only assert his own constitutional rights or immunities". *United States* v. *Raines*, 362 U.S. 17, 22; *McGowan* v. *Maryland*, 366 U.S. 421, 429. And the Supreme Court remains free to test the standing of those who invoke its jurisdiction against the constitutional prerequisites that a "case or controversy" must exist as the basis for the exercise of that jurisdiction. *Doremus* v. *Board of Education*, 342 U.S. 429, 433; *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96, 99-100. Petitioners fail that test.

The rule has been consistently applied, for example, to deny the standing of a state official to attack the validity, under the federal constitution, of a state statute with the enforcement of which he is charged. *Smith* v. *Indiana*, 191 U.S. 138; *Braxton Co. Court* v. *West Virginia*, 208 U.S. 192; and see Hart & Wechsler, The Federal Courts and the

Federal System (1953), p. 162. Thus, the petitioners, and the original defendants, the State election officials, as well, would have lacked standing to challenge the constitutionality of Ch. 3 in this Court, had the decision below gone the other way. *Coleman* v. *Miller*, 307 U.S. 433, 466 (dissenting opinion of Mr. Justice Frankfurter).

However, the same result should obtain in the instant case, where the petitioners who seek to defend the constitutionality of a statute also can allege no private damage, nor claim any adversely affected official law-enforcement interest upon which to rest their standing to raise a federal constitutional issue. There is no question but that "innumerable cases recognize the standing of an administrative or executive official to defend the constitutionality of the legislation which he is charged with administering or enforcing". Hart & Wechsler, *supra*, at 162; see, e.g., *Boynton* v. *Hutchinson Gas Company*, 291 U.S. 656.[9] The standing which this Court accepts in such cases is based upon the "legally recognized duty [of an official] to enforce a statute which he is charged with enforcing", but whose validity has been drawn into question. *Coleman* v. *Miller*, *supra*, at 445 and 466. The petitioners, however, possess no such recognized official interest existing by virtue of a "duty to enforce the state's statute . . . the validity of which has been drawn in question". They are "merely the self-constituted spokesmen of a constitutional point of view . . .". *Id.*, at 467. Nor do they have any personal interest in the litigation, resting on any contention that they, or any persons similarly situated, have suffered pri-

[9] In this case, however, it is doubtful that even the original defendants, the state election officials, would have possessed standing to challenge the adverse opinion of the Maryland Court of Appeals here. As argued in the prior section of this brief, § 4 of Ch. 3 would have precluded their right to maintain such a challenge, since their official interest in enforcing the statute was extinguished under Maryland law by the Court of Appeals' failure to declare the statute effective.

vate damage or have been denied federal constitutional rights for which they seek vindication in this Court. Having been permitted, under state law, to defend the constitutionality of Ch. 3 in the courts of Maryland, petitioners "should be content to abide by their decision". *Smith* v. *Indiana,* 191 U.S. 138, 149. In any event, they cannot demonstrate any private or official stake in the outcome sufficient to confer standing on them in this Court.

The petitioners' lack of standing, therefore, furnishes a second jurisdictional ground for denying the writ of *certiorari.*

## Conclusion

For the reasons stated herein, these respondents urge that the petition for writ of *certiorari* be denied.

Respectfully submitted,

ALFRED L. SCANLAN
9806 Singleton Drive
Bethesda, Maryland

JOHNSON BOWIE
101 Loyola Building
22 W. Pennsylvania Avenue
Towson 4, Maryland

JOHN WRIGHT
12 Church Street
Annapolis, Maryland

FRANCIS X. GALLAGHER
1100 One Charles Center
Baltimore, Maryland

*Attorneys for Respondents*

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C.

*Of Counsel*

May 2, 1966

# APPENDIX 1

Maryland Population Estimate for July 1, 1964, Provisional Estimates for January 1, 1965 and July 1, 1965, and Projections for January 1, 1966—July 1, 1969 by Political Subdivision

| | July 1, 1964 | Jan. 1, 1965 | July 1, 1965 | Jan. 1, 1966 | July 1, 1966 | Jan. 1, 1967 | July 1, 1967 | Jan. 1, 1968 | July 1, 1968 | Jan. 1, 1969 | July 1, 1969 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Maryland State | 3,465,640 | 3,506,930 | 3,548,320 | 3,590,180 | 3,632,090 | 3,674,540 | 3,716,960 | 3,759,930 | 3,802,950 | 3,846,520 | 3,890,080 |
| Baltimore City | 922,270 | 921,700 | 921,150 | 920,550 | 920,000 | 920,000 | 920,000 | 921,000 | 922,000 | 923,000 | 924,000 |
| Total Counties | 2,543,370 | 2,585,230 | 2,627,170 | 2,669,630 | 2,712,090 | 2,754,540 | 2,796,960 | 2,838,930 | 2,880,950 | 2,923,520 | 2,966,080 |
| Allegany | 87,750 | 88,030 | 88,300 | 88,570 | 88,850 | 89,110 | 89,360 | 89,590 | 89,810 | 90,030 | 90,260 |
| Anne Arundel | 248,940 | 253,650 | 258,360 | 263,120 | 267,880 | 272,650 | 277,410 | 282,130 | 286,860 | 291,630 | 296,410 |
| Baltimore | 541,610 | 546,310 | 551,020 | 555,770 | 560,520 | 565,190 | 569,870 | 574,390 | 578,910 | 583,470 | 588,040 |
| Calvert | 17,360 | 17,510 | 17,660 | 17,810 | 17,960 | 18,110 | 18,270 | 18,410 | 18,560 | 18,710 | 18,860 |
| Caroline | 19,760 | 19,750 | 19,750 | 19,750 | 19,740 | 19,730 | 19,720 | 19,700 | 19,680 | 19,670 | 19,650 |
| Carroll | 57,240 | 57,710 | 58,180 | 58,650 | 59,120 | 59,590 | 60,050 | 60,490 | 60,940 | 61,390 | 61,830 |
| Cecil | 56,530 | 57,430 | 58,340 | 59,250 | 60,170 | 61,090 | 62,000 | 62,900 | 63,800 | 64,720 | 65,640 |
| Charles | 36,930 | 37,400 | 37,870 | 38,350 | 38,830 | 39,310 | 39,780 | 40,250 | 40,730 | 41,210 | 41,690 |
| Dorchester | 31,300 | 31,450 | 31,610 | 31,770 | 31,920 | 32,070 | 32,210 | 32,350 | 32,480 | 32,610 | 32,750 |
| Frederick | 82,860 | 84,030 | 85,190 | 86,360 | 87,530 | 88,690 | 89,850 | 90,990 | 92,130 | 93,270 | 94,420 |
| Garrett | 22,460 | 22,670 | 22,890 | 23,110 | 23,340 | 23,550 | 23,770 | 23,980 | 24,190 | 24,400 | 24,610 |
| Harford | 92,920 | 94,740 | 96,560 | 98,390 | 100,230 | 102,090 | 103,940 | 105,780 | 107,620 | 109,490 | 111,350 |
| Howard | 46,900 | 48,110 | 49,330 | 50,570 | 51,800 | 53,030 | 54,260 | 55,490 | 56,710 | 57,950 | 59,190 |
| Kent | 16,410 | 16,500 | 16,590 | 16,690 | 16,780 | 16,870 | 16,950 | 17,030 | 17,120 | 17,210 | 17,300 |
| Montgomery | 414,330 | 422,350 | 430,370 | 438,480 | 446,590 | 454,670 | 462,760 | 470,770 | 478,780 | 486,870 | 494,960 |
| Prince Georges | 485,800 | 500,940 | 516,080 | 531,490 | 546,900 | 562,470 | 578,040 | 593,670 | 609,301 | 625,210 | 741,120 |
| Queen Annes | 17,560 | 17,650 | 17,750 | 17,850 | 17,940 | 18,030 | 18,130 | 18,210 | 18,300 | 18,390 | 18,470 |
| Saint Marys | 44,380 | 44,970 | 45,570 | 46,170 | 46,780 | 47,390 | 48,000 | 48,610 | 49,210 | 49,830 | 50,450 |
| Somerset | 20,140 | 20,150 | 20,170 | 20,190 | 20,200 | 20,210 | 20,220 | 20,220 | 20,220 | 20,230 | 20,230 |
| Talbot | 23,090 | 23,230 | 23,380 | 23,530 | 23,680 | 23,830 | 23,980 | 24,110 | 24,250 | 24,390 | 24,520 |
| Washington | 100,500 | 101,490 | 102,480 | 103,470 | 104,470 | 105,450 | 106,440 | 107,390 | 108,340 | 109,300 | 110,260 |
| Wicomico | 53,260 | 53,690 | 54,120 | 54,560 | 55,000 | 55,430 | 55,850 | 56,260 | 56,670 | 57,090 | 57,500 |
| Worcester | 25,340 | 25,470 | 25,600 | 25,730 | 25,860 | 25,980 | 26,100 | 26,210 | 26,330 | 26,450 | 26,570 |

Maryland State Department of Health, Division of Statistical Research and Records 9/2/65.